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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 218

WILLIAM A. ZEH, ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,

Petitioners,

vs.

AEROGLADE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 19, 1962.

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v.

AEROGLIDE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William A. Zeh, Isidore Krupski, Harold E. Goodale, Alfred W. Topping, Thomas H. White, J. Dwight Reeve, John P. Kujawski, Joseph Sieminski and Walter Truskolaski pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 10, 1962 in a proceeding entitled *Aeroglide Corporation* v. *William A. Zeh, et al.*

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is printed as Appendix "A" hereto. It is officially reported at 301 F. 2d 420. The opinion of the United States District Court for the Eastern District of New York, is printed as Appendix "C". It has not been officially reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on the 10th day of April, 1962 (infra Appendix A). The jurisdiction of this court is invoked under the provisions of 28 U. S. C. A. Section 1254 (1).

Question Presented

May a corporate director be *personally* liable in tort for conversion by voting for certain corporate action when in so voting he relies upon the advice of the corporation's attorney, and its general manager and without knowledge that the action which he thereby authorized may harm the rights of another?

Statement of the Case

Facts

The Suffolk Farmers Cooperative Association, Inc. purchased $84,922.96 worth of Aeroglide machinery. Before the assignment for the benefit of creditors, in 1957, it had paid for all but $13,302.51.

The twelve directors of the Cooperative were full-time farmers. They were unsalaried and, in addition to their function as directors, assisted in the sale of fertilizer, produce and other material handled by the Cooperative (R. a37)*. Because of the nature of this relationship to the Cooperative, they greatly relied upon their principal

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* The following references will be used herein:

App.—Appendices to this petition.

R. a—Record as printed in appendix to appellant's brief in court below.

R. b—Record as printed in appendix to appellees' brief in court below.

full-time officer and employee, Edwin Brangenberg, the General Manager (R. a38).

There were eleven separate purchases. All but one were negotiated directly between Brangenberg, on behalf of the Cooperative, and James F. Kelly, then, vice-president and, now, president of Aeroglide Corporation (R. a30-32). Brangenberg called Kelly and ordered machinery on behalf of the Cooperative (R. a30-32). Kelly sent a confirmation on the usual Aeroglide order form (R. a30). The one contract that was not entirely negotiated by Brangenberg was at his instigation (R. a30). He and Kelly prepared a series of nine proposals covering equipment which they proposed to provide for the Cooperative (R. a30). It was from these proposals that the Cooperative determined to purchase $61,000 worth of machinery. Thereafter, President Zeh and three other directors went to Raleigh, discussed machinery with Kelly, and Zeh signed the proposals (R. b2). The conditional bills were not recorded.

Prior to his becoming the principal full time officer and employee of the Cooperative, Mr. Brangenberg had been active in the farm machinery business for some ten years (R. a36). He had invented some of the machinery which was purchased by the Cooperative from Aeroglide (R. a40). He, also, had been associated with Aeroglide and was familiar with the purchase and sale of Aeroglide or similar farm machinery (R. a36).

Brangenberg, in the early winter of 1957, learned that the Springfield Bank for Cooperatives requested security for its loan to the Farmers Cooperative (R. a33). At the instigation of Brangenberg (R. a33) and the Coop's attorney Hubbard (R. a34), eight of the defendants voted for the mortgage. Zeh and Krupski signed the mortgage. Brangenberg and Hubbard arranged for the consent to mortgage (R. a38-39). At about that time, Brangenberg left the employ of the Farmers Cooperative and, soon thereafter, rejoined Aeroglide Corporation (R. a38).

In determining whether or not the chattel mortgage was feasible, attorney Hubbard, acting also on behalf of the Bank, searched the Suffolk County Clerk's records and, finding no liens on the farm machinery, advised the directors of the Cooperative that a chattel mortgage could be executed to secure the loan from the Springfield Bank (R. a35). Such a chattel mortgage (R. b5) was executed.

The Cooperative terminated its business in July, 1957 and it was stipulated (R. a36) that, if called, Hubbard would testify that:

> "At no time, until after July 3, 1957, was he advised by anyone that there was any conditional sales contract, nor was he advised that anyone claimed any of the personal property, except the Cooperative."

It was further stipulated (R. a40-41), that if the defendants were called, each of them would testify that he was unaware of the provisions in plaintiff's Exhibits 2 through 12, retaining title of the machinery in Aeroglide Corporation.

HISTORY OF THE LITIGATION:

The complaint served in the Spring of 1959 charged each of the defendants, all of whom had been directors of the Suffolk Farmers Cooperative Association, Inc., with having converted the interest of the plaintiff in certain farm machinery delivered to the Cooperative under a conditional bill of sale.

In their answer, the defendants allege that the title to the machinery vested in the Cooperative and that the alleged clause retaining title in Aeroglide was ineffective. The directors, also, alleged that Aeroglide was estopped to contend that it was a contract of conditional sale and that the defendants, as directors of the corporation, were not, personally, responsible for the tort of the corporation since

they had no knowledge that the machinery was not that of the Cooperative.

The trial judge found: that the conditional sales contract was valid, that the directors were charged with constructive knowledge of the existence of the clauses retaining title in Aeroglide, that the participation of the defendants in the execution of the mortgage rendered them jointly and severally liable in conversion.

Decision of the Court of Appeals

Upon appeal to the United States Court of Appeals for the Second Circuit, the court in making its decision and judgment affirmed in part and reversed in part. In affirming, the court found that 8 of the 11 directors had attended the meeting which authorized the mortgage. It further found that a 9th director, Isidore Krupski, treasurer, had signed the chattel mortgage. These nine defendant directors were found to be joint tort feasors in the tort of conversion because eight had voted for the mortgage and the 9th one had signed it. The court further found that two of the directors, Robert W. Gillespie and Joseph P. Celic, had neither formally authorized the mortgage as a director nor signed it as an officer. The appellate court also found that these two men as stockholders but not as directors, had signed a consent to mortgage, which consent was necessary before the mortgage could be voted by the Board of Directors. Regardless of their consent as stockholders, the Court of Appeals found that since they had not participated as directors, they were free of any liability.

Reasons for granting the writ

The writ should be granted because the rule in this decision is one of personal liability predicated upon mere physical participation by a director in corporate acts which constitute a tort; this is in direct conflict with the 1961 Second Circuit Court of Appeals decision in *Armour and*

Company v. *Joseph P. Celic*, et al., 294 F. 2d 432 where the liability is predicated upon the "culpable implication" of the director.

Specifically, we submit that the decision below is unprecedented and erroneous in the following respects:

1. The *Aeroglide* rule casts a director in the role of an insurer of title four corporate acts in which he participates.

2. The *Aeroglide* rule in no way provides for good faith, reasonableness of action or inadvertance.

3. The *Aeroglide* rule determines that a corporate director in relying upon the advice of corporate counsel and its professional staff does so at his peril.

4. The *Aeroglide* rule places a premium upon absence, faithlessness and dereliction of duty.

5. The *Aeroglide* rule encourages dummy directors and discourages attendance at director's meetings.

6. If the *Aeroglide* rule is to be the law of the Circuit, who but a fool, a knave or a bankrupt will be a corporate director?

We, respectfully, submit, that the propositions established by the decision below are so novel and so drastic in their potential effect on the business and economic life of this country, that it is in the public interest that this court review this decision, and put at rest the doubts which it casts upon the duties and liabilities of myriad corporate directors.

Argument

The *Aeroglide* case is an action in conversion. The *Armour* case is also an action in conversion. In 1958, the attorneys for the defendants in the *Armour* action made a motion to make the Armour complaint more definite and certain and in refusing to grant the motion, Judge Abruzzo said in a memorandum printed herein as Appendix "E"

(App. 22a) that "The complaint pleads a plain case of conversion . . .".

The *Aeroglide* case subjects to liability a director who physically participates in the actions which result in the conversion. The *Armour* case subjects to liability only that director who is "culpably implicated" in the acts which result in the conversion. These two rules from the same Circuit Court, determined within 8 months of the other, dealing with the same tort involving the same individual directors-defendants, are in conflict and as such constitute an appropriate instance where this Court may grant appellate review. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507 (1947); *Maggio* v. *Zeitz*, 333 U. S. 56 (1948); *John Hancock Insurance Company* v. *Bartels*, 308 U. S. 180 (1939).

The rule of the *Armour* case is set forth at 294 Fed. 2d 432, 438 where the Court discussed the Cooperative's tortious misappropriation of Armour property:

> ". . . If, as we have found, the Cooperative tortiously misappropriated plaintiff's property by disbursing its monies to persons other than plaintiff and by exchanging its fertilizer for produce, then the defendants who are *culpably implicated* must be held accountable wholly apart from whether their action constitutes a technical conversion.", (emphasis added)

If the *Armour* rule, which requires a finding of culpability; were applied to the facts of the *Aeroglide* case, the defendants, therein, would be exculpated. The *Armour* rule has two parts; first, it requires a finding that the allegedly tortious director was implicated or participated in the acts which constituted a conversion and, secondly, in so participating, his actions were culpable.

Culpable means "criminal", "reckless", "gross". It imparts a "disregard of consequences and an indifference of the rights of others". *People* v. *Grogan*, 260 N. Y. 138, 144 (1932). Black's Law Dictionary, 4th edition, page 454, defines culpable as 'blameable, censurable, . . .".

Rather than being culpable in their actions and in their management of the corporation with respect to determining whether or not to execute the mortgage, the directors in *Aeroglide* were most prudent. In determining to execute the mortgage, the directors sought the advice of the corporate attorney and its professional general manager. As a matter of law, these directors were justified in that reliance. In *Litwin* v. *Allen*, 25 N. Y. S. 2d 667 (1940 not otherwise reported), the court stated, at page 719:

> "Directors have a right in forming their conclusions to rely upon information furnished and conclusions expressed by the management. Lord Halsbury said in holding a bank director not negligent for approving advances on improper security and the payment of dividends out of capital in honest reliance on the statements of the chairman and manager of the bank (*Dovey* v. *Cory*, (1901) App. Cas. 477, 486): 'I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management.'"

In *Gilbert* v. *Burnside*, 197 N. Y. S. 2d 623, at 633 (1959, not otherwise reported), rev'd on other grounds 13 A. D. 2d 982, 216 N. Y. S. 2d 430 (1961) the court stated a corollary principle:

> "It is generally held that where directors seek legal advice and honestly act under it, they are protected from personal liability." Citing: *Blaustein* v. *Pan-American Petroleum & Transportation Co.*, 293 N. Y. 281 (1944); *Bailey* v. *Babcock*, 241 Fed. 501 (W. D. Penna 1915); *Uffelman* v. *Boillin*, 19 Tenn. App. 1, 82 S. W. 2d 545 (1935); *Bates Street Shirt Co.* v. *Waite*, 130 Me. 352, 156 Atl. 293 (1931).

The Second Circuit's *Armour* rule of "culpable implication" is not new. It, correctly, synthesizes the majority rule as to a director's personal liability for a corporate conversion and, in part, is based upon the following deci-

sions: *Santa Barbara* v. *Avalone and Miele, Inc.*, 270 N. Y. 1 (1936); *Darling and Company* v. *Fry* 24 S. W. 2d 722 (Mo. App. 1930 not otherwise reported); *Refrigeration Discount Corp.* v. *Catino*, 330 Mass. 230, 235-236, 112 N. E. 2d 790, 793-794 (1953); *American Agricultural Chemical Co.* v. *Barnes Co., Inc., et al.*, 28 F. Supp. 73, 75 (E. D. So. Carolina 1939).

Santa Barbara v. *Avalone and Miele, Inc.*, 270 N. Y. 1 (1936), involved a situation where certain moneys were delivered to a New York corporation for transmittal to an Italian bank. Instead of transferring the funds to the Italian bank, the moneys were put in a "Dollar Account" of the defendant corporation. Thereafter, the moneys were drawn out of this account by the individual director-defendants by means of checks signed by them but used for payment of expenses of the corporation. There was no finding that any of the individual defendants had appropriated any funds for their own use. One of the defendants Miele signed the checks on the account without knowledge of the purpose of the deposit of the funds. The court, in denying that Miele was, individually, liable, stated:

> "But Miele may be held liable as an active participant in the wrong of the corporation only if he participated as agent in the withdrawal of the money of the plaintiffs from the lire account, or had knowledge that the moneys of the plaintiffs in that account had been placed in the 'Dollar Account' nor is there any finding that Miele participated in the directions which transferred these moneys from the lire account to the 'Dollar Account'. . .
>
> "* * * It is true that Miele was one of the signers of the checks withdrawing the credit arising from the deposit of the moneys belonging to the plaintiffs in the dollar account but he had no knowledge that the moneys were other than assets of the Avalone Corporation, and therefore, available for the purposes of its business." (at pp. 6 and 7).
>
> ". . . No authority has been brought to our attention which would justify our holding this defendant-appellant guilty of conversion".

Santa Barbara was cited with approval in *Refrigeration Discount Corp.* v. *Catino*, et al., 330 Mass. 230, 112 N.E. 2d 790, at 794 (1953). The Massachusetts Supreme Judicial Court found that one officer of the corporation was liable in conversion because he had, knowingly, participated in the wrong, while the second defendant, Mr. Chase, was exonerated since he had no wrongful knowledge even though he did physically participate in acts constituting a conversion.

This rule as to a director applies equally well to an officer or manager. We are fortunate that we have a very close analogy in *Darling & Company* v. *Fry*, 24 S.W. 2d 722 (Mo. App. 1930 not otherwise reported) which, is a principal United States authority, dealing with the liability of officers and directors of farmer associations.

In the Darling case, plaintiff, a manufacturer of fertilizer, entered into a contract with a farmer's association. Some months later, defendant became employed by said association as manager and executive officer. Soon thereafter, plaintiff sold fertilizer to the association after negotiations with defendant-manager. Defendant, thereafter, sold the fertilizer in the normal course of the association's business, using the funds received, admittedly the property of the plaintiff, for other purposes—but not for his own benefit.

The Court absolved the defendant-manager of conversion, stating at page 723:

> "When the proceeds of a sale of goods, consigned to a corporation to be sold on commission, have been intentionally misapplied, the officers in control of the fund who have knowingly participated in the wrong are individually liable, and of course defendant's liability does not depend upon his having derived any personal benefit from the alleged conversion.
>
> "But the manager of a corporation is not personally liable to one who consigns goods to it under a contract making it his agent to sell and account, for mingling the proceeds of sales with the company's

general funds and failing to account, where it is not shown that he had actual knowledge of such contract, and did not participate in the alleged wrongful act."

The rule in the *Darling & Company* case was followed in *American Agricultural Chemical Co. v. Barnes Co., Inc., et al.*, 28 F. Supp. 73, 75 (D.C.E.D. So. Carolina 1939).

The rule in the *Aeroglide* decision, in addition to being in conflict with the *Armour* rule, is illogical and arbitrary; a strict adherence, thereto, will cause a heavy burden upon the commerce of the nation.

In *Miller v. Hope*, 2 Shaw App. Cas. 125 (1824), the judge had denounced the conduct of counsel and had been sued for it. Lord Stair said, with respect to such a suit, that if a judge were to be subjected to such liability, "No man but a begger or a fool would be a judge".

Lord Stair's reasoning is equally applicable to the rule of liability here presented for review. Directors of all major corporations must rely upon the advice of the professional staff as well as the advice of corporate counsel as to matters requiring expert knowledge or else no decision could ever be made consistent with the fast pace of commerce. *Litwin v. Allen*, 25 N.Y.S. 2d 667 (Sup. Ct. 1940, not otherwise reported; *International Paper Co. v. Gazette Co.*, 182 Mass. 578, 66 N.E. 636 (1903).

By virtue of the *Aeroglide* decision, a director takes the advice of corporation counsel at his personal peril. Such a rule, necessarily, states that if the attorney has made an error of fact or judgment and a corporate conversion occurs, the director is personally responsible. If this be so, who but a knave or a fool or a bankrupt will wish to be a director?

Section 27 of the General Corporation Law states that the business of the corporation shall be managed by its Board of Directors. It is also true that a figure-head director is not tolerated in New York state. A director who

accepts the post must attend meetings and vote. *Cavanaugh v. Commonwealth Trust Co.*, 223 N.Y. 103 (1918); Hornstein, *Corporation Law and Practice*, West Pub. Co., 1959, Vol. I, pp. 547.

Such is the public policy of the State of New York, yet the court in the Aeroglide decision found liability against those directors who attended the directors' meetings while exculpating those directors who knew of the vote for the mortgage, but chose that day to be absent. The practical implications of the decision are that it places a premium upon shirking a duty and a penalty upon performing a duty. Under this theory of law, a knowledgeable director will absent himself, and sterilize board proceedings.

Conclusion

The ruling below injects a harsh and arbitrary rule into corporate procedure. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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June 19, 1962

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 155——September Term, 1961

(Argued December 14, 1961 Decided April 10, 1962.)

Docket No. 27096

AEROGLIDE CORPORATION,
Plaintiff-Appellee,

against

WILLIAM A. ZEH, ROBERT W. GILLISPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,
Defendants-Appellants.

Before: LUMBARD, Chief Judge and
MOORE, and HAYS, Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York after a trial without a jury before John L. Miller, Judge, sitting by special assignment, holding appellants liable for a corporate conversion in which they personally participated.

Affirmed in part and reversed in part.

MOORE, Circuit Judge:

Defendants-appellants appeal from a judgment holding them jointly and severally liable for $13,302.51 with interest, the amount remaining due upon machinery purchased from

plaintiff-appellee, AEROGLIDE CORPORATION (Aeroglide), by SUFFOLK FARMERS COOPERATIVE ASSOCIATION, INC. (the Cooperative) of which they were directors. The case was tried to the court without a jury. Jurisdiction is based upon diversity of citizenship, appellants being citizens of New York and appellee being a North Carolina corporation.

The defendants were farmers. They served the Cooperative as directors without salary. On May 23, 1956, Cooperative's board of directors, after discussing proposals submitted by Aeroglide, constituted Zeh, Gillispie, Krupski and Krusinowski (now deceased), a committee to negotiate for the purchase of certain machinery by the Cooperative. The committee visited Aeroglide's plant in Raleigh, N. C., and on May 28, 1956, the Cooperative's president, Zeh, signed a contract for the purchase of grading and packaging machinery at a cost of $61,000. Other orders were given by telephone and, except for one parts order, were confirmed in writing. On the face of the written proposals, contracts and confirmations appeared the words "(subject to conditions printed on reverse side of this sheet)" and on the reverse side under "CONDITIONS" the statement that "Legal title to the equipment will remain in the Seller until full payment as herein stipulated has been received by Seller. Buyer agrees to do anything necessary to see that title so remains in the Seller."

Thereafter and on May 31, 1956, the board of directors was advised of the committee's action and authorized the payment of one-third ($20,333.33) of the contract purchase price ($61,000). Between May 18 and November 12, 1956, the Cooperative had purchased from Aeroglide machinery, the total price of which was $84,922.96 and up to January 8, 1957, had paid $71,620.45, leaving $13,302.51 unpaid.

On and prior to February 26, 1957, the Cooperative was indebted to Springfield Bank for Cooperatives, Springfield, Massachusetts (the Bank) for some $75,000, and was being pressed by the Bank for security as a condition to a further

extension. Without Aeroglide's knowledge or consent, on February 26, 1957, the board of directors, Zeh, Goodale, Topping, White, Reeve, Kujawski, Sieminski and Truskolaski, voting in favor of the resolution, Gillispie, Krupski and Celic, being absent and not voting, authorized the execution and delivery of a chattel mortgage to the Bank of all machinery and equipment on hand which included all the machinery purchased from Aeroglide except two items costing some $4,000. On February 27, 1957, Zeh as president and Krupski as treasurer executed a chattel mortgage in favor of the Bank of all the machinery purchased from plaintiff with the above-mentioned exceptions. Subsequently in September, 1957 the assignee for the benefit of the Cooperative's creditors sold the tangible personal property including the machinery covered by the mortgage and realized $39,968.19 thereon.

The legal situation was as follows: the sales agreements reserved title in Aeroglide had never been filed. Therefore, whereas the agreements were valid as between Aeroglide and the Cooperative,[1] they were not binding upon the Bank which took the mortgage without notice.[2] In effect the action of the directors in authorizing the mortgage on February 26, 1957, was to transfer Aeroglide's property to the Bank. Alleging that this act by the participating directors constituted a conversion of its property, Aeroglide claims the unpaid purchase price as damages. The trial court found that the value of the machinery was in excess of the unpaid $13,302.51 and awarded a judgment in this amount.

---

[1] *Stewart & Co.* v. *Rivara*, 274 U. S. 614 (1927), affirming *Rivara* v. *Steward & Co.*, 241 N. Y. 259, 149 N. E. 851 (1925); *In re Lake's Laundry*, 79 F. 2d 326 (2d Cir. 1935), cert. denied, 296 U. S. 622 (1935); *In re White Plains Ice Service Inc.*, 109 F. 2d 913 (2d Cir. 1940).

[2] *Rodney Hunt Machine Co.* v. *Stewart*, 57 Hun 545, 11 N. Y. S. 448 (3rd Dept. 1890).

See also *Ryerson & Son, Inc.* v. *O'Donnell, Inc.*, 279 N. Y. 109 (1938).

Appendix A

Aeroglide concedes that the directors are not liable for the conversion merely because they were directors and officers of the corporation at the time. "The ordinary doctrine is that a director, merely by reason of his office, is not personally liable for the torts of his corporation; he must be shown to have personally voted for or otherwise participated in them." Fletcher, Private Corporations § 1137 (perm. ed. rev. repl. 1947). This rule was recently cited with approval in *Armour & Co.* v. *Celic*, 2 Cir. 1961, 294 F. 2d 432, 439, which involved a suit on another transaction against eight of these same directors. The law of New York, the place of the wrong, is applicable. Under New York law, the execution and delivery of a chattel mortgage, without transfer of possession, affecting property to which the mortgagor has not acquired title, constitutes a conversion. "The conditional vendee is still, in effect, the vendor's bailee, and as such remains liable to the vendor for any conversion of the goods." (*Rodney Hunt Machine Co.* v. *Stewart*, 57 Hun 545, 552, 11 N. Y. S. 448, 451 (3rd Dept., 1890).) See also *Kominz Tire Co.* v. *Universal Credit Co.*, 258 App. Div. 774, 14 N. Y. S. 2d 840 (4th Dept., 1939); *Credit Acceptance Corp.* v. *Fohl*, 251 App. Div. 796, 296 N. Y. S. 777 (4th Dept., 1937).

Appellants concede that personal participation would appear to be sufficient to place liability on a corporate director and cite a fairly recent New York case (*Melnick* v. *Sable*, 11 A. D. 2d 1075, 206, N. Y. S. 2d 825, 826 (Second Dept., 1960) for the proposition that "such liability [for conversion] accrues only against the individual officer who consummated the conversion through his personal action." As stated in *Passaic Falls Throwing Co.* v. *Villeneuve-Pohl Corp.*, 169 App. Div. 727, 729, 155 N. Y. Supp. 669, 670 (1st Dept., 1915), "every person is liable who personally or by agent commits an act of conversion or who participates by instigating, aiding or assisting another."

Upon this very theory, the trial court held the directors liable because they did personally participate in the acts constituting conversion, namely, by authorizing the execution of the chattel mortgage. That there was no direct evidence in the record that the directors were aware of Aeroglide's security interests is not determinative. The tort of conversion requires no intent or fault. The determinative question then is whether these directors personally participated in the conversion which resulted from the execution and delivery of the mortgage. Appellants Zeh and Krupski are liable because they signed the mortgage; this is clearly personal participation in the act constituting conversion even though done on behalf of the corporation. Personally voting for the mortgage as a director is also sufficient participation. Management of the corporation is vested in the board of directors,[3] and the vote authorizing the execution of the mortgage must be viewed as the basic act from which the conversion resulted. While it is true that there could be no conversion until execution and delivery of the mortgage, the latter are formalities which flow in the normal course of events from the affirmative action taken by the directors.

The only remaining question concerns the liability of Gillispie and Celic. They did not attend the directors' meeting, and, therefore, did not vote for the mortgage as directors. They were among the holders of two-thirds of the shares outstanding who consented in writing to the execution of the mortgage before the vote of the directors.[4] However, Aeroglide does not seek to hold Gillispie and Celic liable as stockholders. Nor would the action of the stockholders have been a conversion in itself; the directors' resolution and the execution of the mortgage were necessary to transfer the title.

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[3] New York General Corporation Law, sec. 27.

[4] New York Stock Corporation Law, sec. 16.

Appendix A

The natural inclination on the facts of this case is to treat all of these directors alike, and it may be somewhat inequitable to hold that two directors are not liable simply because they failed to appear at a directors' meeting. Yet liability for conversion is imposed not upon the basis of fault but for actions taken, however innocently. Thus, any inequality results from the nature of the tort. We, therefore, reverse as to Gillispie and Celic, and affirm the judgment entered against the other appellants.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of April one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. LEONARD P. MOORE,
HON. PAUL R. HAYS, Circuit Judges.

AEROGLIDE CORPORATION,
Plaintiff-Appellee,
against
WILLIAM A. ZEH, ROBERT W. GILLISPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcipt of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judement of said District Court as to appellants Robert Gillispie, Jr. and Joseph P. Celic be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that that part of the judgement as to all the other appellants be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

AEROGLIDE CORPORATION, *Plaintiff,* *vs.* WILLIAM A. ZEH, ROBERT W. GILLESPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI, *Defendants.*	CIVIL ACTION No. 19737

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

MILLER, D.J.

In this proceeding, plaintiff, as a conditional vendor of certain farm implements sold to the Suffolk Farmers Cooperative Association, Inc., seeks to recover damages from the directors of the conditional vendee for an act of conversion committed by the subsequent execution of a chattel mortgage purporting to cover the identical implements.

This action having been tried by the court without a jury, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff is a North Carolina corporation and defendants are New York citizens. The amount in contro-

versy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

2. Plaintiff is a manufacturer of grading and packaging machinery for farm produce with office and plant at Raleigh, North Carolina.

3. From its organization until after February 27, 1957, defendants Zeh, Gillispie, Krupski, Goodale, Celic, White, Reeve, Kujawski, Sieminski and Truskolaski were directors of Suffolk Farmers Cooperative Association, Inc. (hereafter called "Cooperative"), a corporation organized under the New York Cooperative Corporations Law; defendant Topping was a director from November 16, 1956 until after February 27, 1957; defendants Zeh, Gillispie and Goodale were at all times president, vice president and secretary respectively of said corporation and after August, 1956, defendant Krupski was its treasurer.

4. Between May 18, 1956 and November 12, 1956, both dates inclusive, plaintiff sold and delivered to Cooperative grading and packaging machinery for farm produce at the total agreed price of $84,922.96. Between May 28, 1956 and January 8, 1957, Cooperative made payments on account of said purchases aggregating $71,620.45, leaving a balance unpaid of $13,302.51.

5. Said purchases were made pursuant to twelve certain contracts of sale. Said contracts were made on or about May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7, November 8 and August 28, 1956, respectively.

6. The contract of May 28, 1956, was signed at Raleigh, North Carolina, by James F. Kelly, vice president (and now president), on behalf of plaintiff, and by William A. Zeh, president, on behalf of Cooperative, and was for the

purchase by Cooperative from plaintiff of grading and packaging machinery for farm produce at the total price of $61,000.00.

7. Said contract of May 28, 1956, was negotiated at Raleigh, North Carolina, by a committee consisting of defendants Zeh, Gillispie, Krupski and one Prusinowski (now deceased). Said committee had been constituted by the board of directors May 23, 1956; the committee brought with them to Raleigh proposals previously submitted by plaintiff and discussed by the board; in such negotiation at Raleigh the committee obtained from plaintiff certain concessions including a reduced price, all of which were incorporated in said contract of May 28, 1956.

8. The contracts other than that of May 28, 1956, each resulted from telephoned orders to plaintiff. Following each said telephone conversation, plaintiff mailed to Cooperative a confirmation setting forth the items purchased and the price thereof. In the case of the contract of August 28, 1956, which was for parts to be incorporated in Cooperative's grading and packaging systems, and for which the price was $981.94, no confirmation was sent. The total price of the purchases other than those under the contract of May 28, 1956, was $23,922.96.

9. The machinery delivered under and pursuant to the contracts of May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7 and November 8, 1956, respectively, was delivered and accepted by Cooperative without objection or protest on the part of Cooperative or any of its officers or directors with respect to any provision contained in said confirmations of contract.

10. On the front of said contracts of May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7 and November 8, 1956, respectively, and on all other

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written proposals, contracts and confirmations delivered to Cooperative by plaintiff there appeared the following:

> "Aeroglide Corporation proposes to furnish the following (subject to conditions printed on reverse side of this sheet):".

On the reverse side of each sheet, in type of the same size, there appears among such "conditions":

> "Legal title to the equipment will remain in the Seller until full payment as herein stipulated has been received by Seller. Buyer agrees to do anything necessary to see that title so remains in the Seller."

On the reverse side also are these general terms of payment:

> "All prices are f.o.b. Raleigh, North Carolina, and payable at Raleigh, North Carolina, unless otherwise specified and no discounts will be allowed unless specified herein. Any state, local, or federal taxes are to be added to the price quoted."

11. Said contract and confirmations were not filed as conditional sales agreements in any public office where such agreements may be filed under Article 4 of the New York Personal Property Law, or therewise, until August 6, 1957.

12. On or about February 27, 1957, Cooperative was indebted to Springfield Bank for Cooperatives of Springfield, Massachusetts, in the amount of $75,000.00 for money loaned.

13. On February 27, 1957, to secure the payment of said loan and obtain an extension thereof Cooperative, by defendant Zeh as its president and defendant Krupski as its treasurer, and without plaintiff's knowledge or consent, made and executed to said Springfield Bank for Cooperatives a chattel mortgage upon all of the machinery and

equipment then on had. Said machinery and equipment included all of the grading and packaging machinery purchased by Cooperative from plaintiff except a bag closer purchased under the May 28, 1956 contract at the price of $1,908.55, and the machinery purchased under the June 6, 1956 contract, priced at $2,067.83, which bag closer and machinery had been sold to and paid for by defendant Zeh.

14. On February 26, 1957, the board of directors of Cooperative, with defendants Zeh, Goodale, Topping, White, Reeve, Kujawski, Sieminski and Truskolawski voting in favor of said resolution, authorized the execution and delivery of said mortgage. Defendants Gillispie, Krupski and Celic were absent from the meeting.

15. On or prior to December 31, 1956, all of the defendants, including said defendants Gillispie, Krupski and Celic, had as stockholders executed and delivered in writing a consent to the execution and delivery of said mortgage.

16. Said mortgagee, Springfield Bank for Cooperatives, was without notice of the fact that the machinery which Cooperative thus mortgaged to it had been sold by plaintiff to Cooperative pursuant to conditional sales agreements and that the title to said machinery remained in the vendor.

17. At the time of the giving of said chattel mortgage, the total cost of all machinery and equipment purchased by Cooperative was $93,994.60. The only grading and packaging machinery which Cooperative had on hand and which it had not purchased from plaintiff was a Halleck & Gunther elevator or conveyor and a used Boggs grader.

18. At the time of the giving of said mortgage on February 27, 1957, the total value of the grading and packaging machinery purchased by Cooperative from plaintiff pursuant to said agreements of conditional sale was at least the sum of $23,193.50.

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19. At the time of the giving of said mortgage on February 27, 1957, the value of the grading and packaging machinery purchased by Cooperative from plaintiff under the contract of May 28, 1956, at a price of $61,000.00, was at least the sum of $15,335.00.

20. At the time of the execution and delivery of said mortgage on February 27, 1957, the balance of the purchase price of the grading and packaging machinery purchased by Cooperative from plaintiff remaining unpaid was, and it now is, the sum of $13,302.51.

21. Subsequent to the execution and delivery of said mortgage and on September 20, 1957, one Seth Hubbard as assignee for the benefit of creditors sold at auction all tangible personal property then on hand, including the machinery covered by said mortgage, and realized therefrom the total amount of $44,409.10 or after deducting auctioneer's commissions the amount of $39,968.19.

Discussion

Three basic questions are presented for determination by the court: (1) whether the retention of title provisions on the reverse side of plaintiff's printed agreement became part of the agreement between the parties; (2) whether the execution and delivery of a chattel mortgage by a conditional vendee covering machinery subject to a conditional sale constitutes a conversion of such machinery; and (3) whether directors are individually liable in tort for conversion by reason of executing said chattel mortgage on behalf of the Cooperative.*

1. Turning initially to the retention of title question, it is of course fundamental that:

---

* Applicability of New York law under the "center of gravity" test, *Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 2d 99 (1954), is not questioned by the parties.

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> "A party should not be bound by clauses printed on the reverse side of a document unless it be established that such matter was properly called to its attention and that it assented to the provisions there stated."

Arthur Philip Export Corp. v. *Leathertone*, 275 App. Div. 102, 87 N. Y. S. 2d 665, 667 (1949). See also 17 C. J. S., Contracts, § 41(g). It is likewise fundamental that, in the absence of fraud or duress, one who signs or accepts a written agreement is conclusively presumed to have full knowledge of its contents. *Upton* v. *Tribilcock*, 91 U. S. 45 (1875); *Matter of Stone*, 272 N. Y. 121, 5 N. E. 2d 61 (1936); *Metzger* v. *Aetna Insurance Co.*, 227 N. Y. 411, 125 N. E. 814 (1920). Admittedly, the question is one of fact.

Unlike the printed agreement in *Arthur Philip Export Corp.* v. *Leathertone*, supra, where the only reference to the arbitration provision—"(See also back)"—appeared in small print on the right-hand side of the lower center of the face of the document following the signature, the plaintiff's printed agreement contains a reference to the title provisions at the very beginning of the document and annexed to the operative words of the offer. Compare *Fields, Inc.* v. *American Hydrotherm Corp.*, 5 App. Div. 2d 647, 174 N. Y. S. 2d 184 (1st Dept. 1958), where a reference, "1 Hot Water system as per quotation," was held to make binding an arbitration provision in small print on the last page of the quotation. The type here is the same as used throughout the printed agreement and the retention of title provisions appear on the reverse side of each copy. The court concludes that such provisions became part of the agreement between the parties.

Defendants contend, however, that plaintiff is estopped to deny that the relationship between the parties was merely that of vendor-vendee by reason of its failure to file the agreement, and by its use of terms of payment inconsistent with a retention of title.

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As between the parties, a conditional sales agreement is valid despite the fact that it is never filed. *Stewart & Co.* v. *Rivara*, 274 U. S. 614 (1927), affirming *Rivara* v. *Stewart & Co.*, 241 N. Y. 259, 149 N. E. 851 (1925); *In re Lake's Laundry*, 79 F. 2d 326 (2d Cir. 1935), cert. denied 296 U. S. 622 (1935); *In re White Plains Ice Service Inc.*, 109 F. 2d 913 (2d Cir. 1940). Requirements that such agreements be filed are enacted solely for the protection of subsequent purchasers. §65 New York Personal Property Law; *Goetschius* v. *Brightman*, 245 N. Y. 186, 156 N. E. 660 (1927).

Moreover, the fact that plaintiff's monthly statements contained such terms of payment as "Net 10 days" or "Balance due on shipment" does not work an abandonment of the retention of title provisions. Such terms, while certainly inconsistent with an alleged shipment on consignment, cf. *Armour & Co.* v. *Celic*, 188 F. Supp. 700 (E. D. N. Y. 1960), are entirely consistent with a conditional sale.

II. Under New York law, it appears settled that the mere execution and delivery of a chattel mortgage, without transfer of possession, constitutes a conversion. In *Rodney Hunt Machine Co.* v. *Stewart*, 57 Hun. 545, 11 N. Y. S. 448 (3rd Dept. 1890), a case substantially identical to the instant one, the conditional vendee mortgaged water wheels to a mortgagee who had no notice of the unfiled conditional sales agreement. Concluding that the property was converted, the court stated:

> ". . . Under such circumstances, it would seem clear that the sale or mortgage by the conditional vendee, who, as we have seen, was before the performance of the condition under the conditional purchase, but a bailee of the vendor, is a conversion of the conditional vendor's chattel. While the conditional vendor would be precluded by the provisions of this act from pursuing his property, and recovering the same from a *bona fide* purchaser or mortgage, the obligation of the conditional vendee to the vendor is not changed

by this act. The conditional vendee is still, in effect, the vendor's bailee, and as such remains liable to the vendor for any conversion of the goods." 57 Hun. at 552-553.

Similarly, in *Mendelson v. Boettger*, 257 App. Div. 167, 12 N. Y. S. 2d 671 (2d Dept. 1939), aff'd 281 N. Y. 747, 23 N. E. 2d 554, the consolidation of a $40,000 mortgage owned by the trust company, of which the defendants were directors, with two mortgages in which plaintiff owned "First Mortgage Participation" certificates was held to constitute a conversion.

> "The power which the trust company thus arrogated to itself to change the nature of the lien of the mortgages in which plaintiff held an interest could arise only from ownership. This constituted conversion. To constitute conversion there need not be an outright misappropriation of the property of another. It is sufficient if there be interference with the owner's dominion over his property to the exclusion of his rights. In *Laverty* v. *Snethen* (68 N. Y. 522, 524) Church, Ch. J., writes: 'Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. (Bouv. Law Dict., title Conversion.)' . . . By the act of defendants, the security has been plunged into confusion, and possibly default, resulting in injury and expense to the plaintiff, and that is all that is necessary to sustain a cause of action in conversion." 12 N. Y. S. 2d at 673-674.

The defendants contend that the chattel mortgage is void under § 15 of the Stock Corporation Law of New York and, therefore, plaintiff has failed to meet its burden of proof which, defendants argue, includes proof of the validity of the mortgage.

As the court understands the law of New York, neither the validity nor invalidity of the mortgage is material in an action for conversion. Plaintiff's security has nonetheless been "plunged into confusion, and possibly default, resulting in injury and expense to the plaintiff, and that is all that is necessary to sustain a cause of action in conversion." *Mendelson* v. *Boettger*, supra. Defendants' exercise of dominion over the machinery in defiance of plaintiff's right, *Debolles* v. *Butterly*, 210 App. Div. 50, 205 N. Y. S. 104 (1st Dept. 1924), and their assertion of ownership inconsistent with that of the plaintiff, *U. S. Fidelity & Guaranty Co.* v. *Newburger*, 263 N. Y. 16, 188 N. E. 141 (1933), constituted a conversion.

In any event, the defendants will not now be heard to deny the natural consequences of their acts. *U. S. Fidelity & Guaranty Co.* v. *Newburger*, supra; 31 C. J. S., Estoppel § 17.

III. The final question, that of the individual liability of the directors, was similarly raised in *Armour & Co.* v. *Celic*, supra, an action against the identical directors for conversion of fertilizer allegedly sold on consignment. Interpreting New York law, Judge Abruzzo held not only that directors are bound by the written terms of an agreement entered into by a corporation because they are charged with knowledge of its existence, but also that directors are jointly and severally liable for torts committed on behalf of a corporation and the fact that they also acted on behalf of the corporation would not relieve them from personal liability. (See authorities cited therein.) Having previously found the retention of title provisions to be part of the agreement

between the parties, the court concludes that defendants are charged with knowledge of its existence. Their participation in the execution and delivery of the chattel mortgage, although done solely on behalf of the Cooperative, renders them j ly and severally liable.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the case upon the grounds of diversity of citizenship and amount in controversy.

2. There is due and owing from Cooperative to plaintiff upon its purchases from plaintiff of grading and packaging machinery the sum of $13,302.51.

3. The several agreements of May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7, November 8 and August 28, 1956, respectively, were agreements of conditional sale and the effect thereof was that until full payment of the purchase price therefor Cooperative acquired no title to the machinery sold thereunder, but plaintiff retained such title unless and until it should be deprived thereof in favor of third persons in accordance with Article 4 of the New York Personal Property Law.

4. Springfield Bank for Cooperatives was a mortgagee without notice of the machinery covered by the mortgage executed and delivered by Cooperatives to said bank on or about February 27, 1957.

5. Th effect of the mortgage of February 27, 1957, from Cooperative to Springfield Bank for Cooperatives was to extinguish plaintiff's said retained title to said machinery and equipment.

6. The execution and delivery of said mortgage by Cooperative to said Springfield Bank for Cooperatives constituted a conversion of plaintiff's property in said grading and packaging machinery.

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7. Defendants and each of them participated in said conversion.

8. Defendants and each of them are jointly and severally liable to plaintiff in the amount remaining due upon said purchases of grading and packaging machinery by Cooperative from plaintiff, and plaintiff is entitled to recover from said defendants and from each of them the sum of $13,302.51 with interest thereon from February 27, 1957, together with the costs of this action.

ORDER OF COURT

Now, this 1st day of June, 1961, after trial by the court without a jury, and the hearing of all the evidence, and upon the findings of fact and conclusions of law, it is ORDERED and DIRECTED that judgment be entered in the sum of $13,302.51 with interest from February 27, 1957, in favor of the plaintiff, Aeroglide Corporation, and against the defendants, William A. Zeh, Robert W. Gillispie, Jr., Isidore Krupski, Harold E. Goodale, Alfred W. Topping, Joseph P. Celic, Thomas H. White, J. Dwight Reeve, John P. Kujawski, Joseph Sieminski and Walter Truskolaski, together with the costs.

/s/ JOHN L. MILLER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

AEROGLIDE CORPORATION,
Plaintiff,

against

WILLIAM A. ZEH, ROBERT W. GILLISPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,
Defendants.

CIVIL ACTION.
No. 19737
JUDGMENT

June 2, 1961

Upon the foregoing direction of the Court judgment in the sum of $13,302.51 with interest from February 27, 1957, is hereby rendered against all of the defendants and judgment for costs when taxed shall also be rendered and entered against all of the defendants.

/s/ SIDNEY R. FEUER,
Clerk.

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ARMOUR AND COMPANY, *Plaintiff*, v. JOSEPH P. CELIC, J. DWIGHT REEVE, JOHN BAUER, THOMAS WHITE, ALBERT TOPPING (first name "ALBERT" being fictitious, true first name unknown to plaintiff), WILLIAM A. ZEH, ROBERT W. GILLISPIE, HAROLD E. GOODALE and ISIDORE P. KRUPSKI, *Defendants*.	Civil Action No. 18151

January 22, 1958

ABRUZZO, D. J.

This is an application made by eight of nine defendants to dismiss the complaint on the ground that the plaintiff does not state a claim upon which relief can be granted or, in the alternative, that an order be entered requiring the plaintiff to make its complaint more definite and certain.

The complaint alleges in substance that the defendants are and were directors of Suffolk Farmers Co-Operative Association, Inc., hereinafter referred to as the Co-Operative; that plaintiff agreed to deliver and the Co-Operative agreed to accept fertilizer on consignment and for plaintiff's account, all demands and accounts resulting from the sale of the fertilizer to become and remain the property of the plaintiff; that pursuant to the agreement plaintiff made deliveries to the Co-Operative on consignment; that the Co-Operative sold the fertilizer but that the purchase

moneys were not remitted to plaintiff but were converted by the Co-Operative and by the defendants to their own use and to the use of others; that each of the defendants had cause to know and did know that the goods and credits of the plaintiff were being converted.

The defendants move to dismiss the complaint, contending that it is insufficient because plaintiff has failed to plead a cause of action under the provisions of Sections 60 and 61 of the General Corporation Law of the State of New York.

Section 60 provides in part:

> § 60. *Action against officers of corporation for misconduct.*
>
> An action may be brought against one or more of the directors or officers of a corporation to procure judgment for the following relief or any part thereof:
>
> * * *
>
> 2. To compel them to pay to the corporation, or to its creditors, any money and the value of any property, which they have acquired through any neglect of or failure to perform or other violation of their duties.
>
> * * *

Section 61 provides that a creditor, among others, may bring the action prescribed in Section 60.

The plaintiff's complaint is not predicated on either of these sections.

The complaint pleads a plain case of conversion of moneys allegedly belonging to plaintiff by either the Co-Operative, plaintiff's agent to sell and return the proceeds of the sale to plaintiff, or the directors of the Co-Operative, or both.

In *Sturm* v. *Boker*, 150 U. S. 312, 330, it was held that an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment (cited with approval in *Ludvigh* v. *American Woolen Co.*, 231 U. S. 522,

528). Nor can the proceeds of a bailment be subjected by the bailee's creditors to the payment of bailee's debts. *Sturm v. Boker, supra.*

The Co-Operative was not made a party to this suit; nevertheless, the plaintiff may maintain this action against these defendants for conversion of plaintiff's money for their own use or the use of others with their knowledge and consent.

Rule 8(a) of the Federal Rules of Civil Procedure provides:

> Rule 8. *General Rules of Pleading.*
>
> (a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

In *Dioguardi* v. *Durning*, 139 F. 2d 774 (C. A. 2d), it was said (p. 775):

> Under the new rules of civil procedure, there is no pleading requirements of stating "facts sufficient to constitute a cause of action," but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief," Federal Rules of Civil Procedure, rule 8(a), 28 U. S. C. A. following section 723c; * * *

The Court is of the opinion that the plaintiff in its complaint has given the defendants fair notice of the nature and basis of its claim and, therefore, the defendants' motion is denied in its entirety.

ABRUZZO,
U. S. D. J.

Office Supreme Court, U.S.
FILED
JUL 19 19[illegible]
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 218.

WILLIAM A. ZEH, ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,

Petitioners,

vs.

AEROGLIDE CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

HAROLD HARPER,
Counsel for Respondent,
70 Pine Street,
New York 5, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 218.

WILLIAM A. ZEH, ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,

Petitioners,

vs.

AEROGLIDE CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of the Case.

Petitioners are directors and officers of Suffolk Farmers Cooperative Association, Inc., which purchased machinery from respondent under several contracts of conditional sale. While a balance of $13,302.51 remained unpaid, the Cooperative mortgaged the machinery to a bank. The conditional sales contracts, although unfiled, remained valid as between the original parties.* The mortgage to a

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* *Stewart & Co. v. Rivara* (1927) 274 U. S. 614, affirming *Rivara v. Stewart & Co.* (1925) 241 N. Y. 259.

purchaser for value without notice, however, extinguished respondent's title (§ 65, New York Personal Property Law) and constituted a conversion.* Petitioners do not now dispute that the giving of the mortgage was a conversion of the machinery. The only matter remaining in controversy is whether petitioners, all of whom as directors voted to give the mortgage, and two of whom, Zeh and Krupski, executed it, are personally liable for the conversion.

The facts are adequately stated both in the findings of the District Court [R. a16-20]** and of the Court of Appeals [App. 1a-6a].

Reasons for Denying Certiorari.

1. This Court will not disturb the decision of the Court of Appeals upon a question of state law.

2. The law of conversion is well defined in New York and amply supports the decision below.

3. The alleged conflict between panels of the Court of Appeals is illusory and based upon a misreading of *Armour* v. *Celic*.***

4. The question posed does not fairly arise upon the record.

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* *Rodney Hunt Machine Co.* v. *Stewart* (3d Dept. 1890) 57 Hun. 545.

** The references adopted in the petition (p. 2) will be used herein.

*** 294 F. 2d 432.

ARGUMENT.

POINT I.

This Court will not disturb the decision of the Court of Appeals upon a question of State Law.

Jurisdiction was founded upon diversity and, hence, the question was purely one of local law.

In the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon, and is measured by the law of the place where the tort occurred. *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd.* (1949) 336 U. S. 386, 396. In the case of conversion, it is where the conversion occurred. *Salimoff & Co.* v. *Standard Oil Co.* (1933) 262 N. Y. 220. The Court of Appeals treated the question as one of New York law [App. 4a].

The general policy of this Court is to leave undisturbed a holding of the Court of Appeals on a question of state law. *Estate of Spiegel* v. *Commissioner of Internal Revenue* (1949) 335 U. S. 701, 708. This Court does not reexamine the local law as applied by the lower courts. *Skelly Oil Co.* v. *Phillips Co.* (1950) 339 U. S. 667, 674. It is particularly loath to do so where, as here, the Court of Appeals and the District Court are in agreement as to the local law. *Appalachian Power Co.* v. *American Institute of Certified Public Accountants* (Opinion of Brennan, J. in Chambers, 1959) 4 L. Ed. 2d 30, 80 Sup. Ct. 16.

POINT II.

The law of conversion is well defined in New York and amply supports the decision below.

It is the law of New York that a converter is not exonerated because he proceeded in an honest but mistaken belief that the property was his own.

In *Boyce* v. *Brockway* (1865) 31 N. Y. 490, the Court said, per Davis, J. (p. 493):

> "The law on this subject is well settled. 'The proof,' says Brown, J., in *Cobb* v. *Dows* (9 Barb., 242), 'need not show a tortious taking, or that the defendants acted in bad faith. If it should appear that they obtained the goods fairly from a person whom they had reason to think was the true owner, or if they acted under a mistake as to the plaintiffs' title, or under an honest but mistaken belief that the property was their own, they would still be liable to plaintiff if their acts in regard to it amount to a conversion. If they have taken it into their own hands, or disposed of it to others, or exercised any dominion over it whatever, they are guilty of a conversion, and their liability to plaintiffs is established.' This exposition of the law is fully sustained by the authorities [Citing authorities].
>
> "A wrongful intent is not an essential element of the conversion. It is enough in this action that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it."

This continues to be the law in New York. *Pease* v. *Smith* (1875) 61 N. Y. 477; *Industrial & General Trust* v. *Tod* (1902) 170 N. Y. 233; *Koslow, Inc.* v. *Bletterman* (N. Y. Tr. T. 1960) 23 Misc. 2d 340.

A corporate director who participates in a conversion of another's property is not relieved of liability because he is acting on behalf of the corporation. *Mendelson* v. *Boettger* (2d Dept. 1939) 257 App. Div. 167, aff'd. no opinion 281 N. Y. 747; *McCrea* v. *McClenahan* (2d Dept. 1909) 131 App. Div. 247; *Melnick* v. *Sable* (2d Dept. 1960) 11 A. D. 2d 1075. This is true though the corporate representative is acting under a claim of right on behalf of the corporation. *Debobes* v. *Butterly* (1st Dept. 1924) 210 App. Div. 50. And even church trustees have been recently held personally liable for authorizing the removal of gravestones which they believed the church had the right to remove. *Conn* v. *Boylan* (Sp. T., Suffolk, 1962) 224 N. Y. S. 2d 823 (not officially reported).

The agent is not exonerated because he acts in good faith in the mistaken belief that the property converted belongs to his principal. *Spraights* v. *Hawley* (1868) 39 N. Y. 441; *Kachurin* v. *American Iraq Shipping Co.* (N. Y. Tr. T. 1946) 187 Misc. 178. In *Suzuki* v. *Small* (1st Dept. 1925) 214 App. Div. 541, aff'd. no opinion 243 N. Y. 590, the Court said by Burr, J. (p. 557):

> "The defendant, even though acting as agent and in entire good faith, is nevertheless liable for the conversion.
>
> "It has been held without exception that wrongful intent is not a necessary element of a conversion. Nor is the fact that the defendant was acting as an agent a defense at all."

Likewise, the representatives of a corporation who participate in the conversion are personally liable though their intentions are honest. In *Passaic Falls Throwing Company* v. *The Villeneuve-Pohl Corporation* (1st Dept. 1915) 169 App. Div. 727, the Court said, by Clarke, J. (p. 729):

> "So far as the defendants Pohl and Friedlander are concerned, as officers and agents of the defend-

> ant corporation, they participated in obtaining the possession of the property from the plaintiff and in converting it and the proceeds thereof to the use of the defendant. They were, therefore, joint feasors. Every person is liable who personally or by agent commits an act of conversion or who participates by instigating, aiding or assisting another. An agent or servant who converts the property of a third person is liable for such conversion, and it is no defense if his acts were committed in pursuance of his employment or for the benefit of his principal or master, though the servant or agent acted under a *bona fide* belief that his master or principal was the owner of the property and in ignorance of the true owner's rights, since one who interferes with personal property must at his peril see that he is protected by authority of the true owner.
>
> "The judgment was, therefore, rightly entered against Pohl and Friedlander."

There is thus no special immunity for officers or directors of a corporation.

Petitioners' reliance on *Santa Barbara* v. *Avallone & Miele, Inc.* (1936) 270 N. Y. 1, is misplaced. In that case, a customer had entrusted securities to a financial house to be forwarded to Rome for sale. The proceeds had been remitted and placed in the corporation's Lire Account in this country. They were then wrongfully transferred from that account to the Dollar Account. The ordinary expenses of the corporation were regularly paid from the latter, and plaintiff sought a recovery against Miele, an officer who, without knowledge of the wrong, had merely withdrawn moneys from the Dollar Account for the regular expenses of the corporation. He was held not liable.

The case is readily distinguishable. After pointing out that the liability of the corporation was not for conversion,

but as a trustee *de son tort*, the Court said, per Finch, J. (p. 6):

> "But Miele may be held liable as an active participant in this wrong of the corporation only if he participated as agent in the withdrawal of the money of the plaintiffs from the lire account, or had knowledge that the moneys of the plaintiffs in that account had been placed in the 'Dollar Account.' The findings do not show that Miele had knowledge that these moneys had gone into the 'Dollar Account,' nor is there any finding that Miele participated in the directions which transferred these moneys from the lire account to the 'Dollar Account.'"

Thus, the Court treated the transfer from the Lire to the Dollar Account as the tort. What the Court in effect said is that if Miele had participated in the transfer from the Lire to the Dollar Account he would have been liable as in the case of conversion. And if he had withdrawn the money from the Dollar Account with knowledge of the tort he would be liable as for a breach of trust.

It must be emphasized liability has been imposed upon petitioners here, not for failure to supervise or investigate the acts of others, but because of their personal participation in converting respondent's property and thereby causing injury.

It is now undisputed that the mortgage to the bank of property subject to the conditional sales contracts constituted a conversion. Petitioners all voted for the resolution authorizing the mortgage [Finding 14, a19] and petitioner Zeh, as president, and petitioner Krupski, as treasurer, made and executed it [Finding 13, a19]. This participation was sufficient to hold them liable under the law of New York, whether or not they acted mistakenly and in good faith.

POINT III.

The alleged conflict between panels of the same Court of Appeals is illusory and based upon a misreading of *Armour* v. *Celic*.

Despite the fact that the decisions (rendered but seven months apart) were unanimous and that Chief Judge Lumbard and Judge Moore participated in both, petitioners assert (p. 5) that certiorari ought to be granted because the *Aeroglide* decision "is in direct conflict with" the *Armour* decision.

Petitioners say (p. 7): "The *Armour* case subjects to liability only that director who is 'culpably implicated' in the acts which result in the conversion". Petitioners then argue that "culpable" means "criminal", "reckless", "gross".*

A more careful reading of the passage relied upon by petitioners and of its context will show that the Court of Appeals had no intention of relieving the *Armour* defendants from liability if upon the facts to be developed upon remand they were found to have participated in the conversion. The passage relied upon is as follows:**

> "Defendants' argument that conversion will not lie because money cannot be the proper subject of conversion requires little consideration. Although the action was cast in terms of conversion, the liability of the defendants need not be pitched on so narrow a ground. If, as we have found, the Cooperative tortiously misappropriated plaintiff's property by disbursing its monies to persons other

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* "Culpable" sometimes means no more than to be in breach of a legal duty. Black's Law Dictionary, p. 487 (3rd ed. 1944); and see *Noonan* v. *Luther* (3d Dept. 1907), 119 App. Div. 701, 703.

** *Armour and Company* v. *Celic* (2 C. A. 1961) 294 F. 2d 432, 438.

> than plaintiff and by exchanging its fertilizer for produce, then the defendants who are culpably implicated must be held accountable wholly apart from whether their action constitutes a technical conversion."

What the Court says is not that petitioners may be held liable for conversion only if they are "culpably implicated". What it does say is that if they are "culpably implicated" they must be held accountable wholly apart from whether their action constitutes a technical conversion.

The opinion nowhere suggests a rejection of New York law, which holds a participant in a conversion by the corporation liable irrespective of his good faith and mistaken impression that the property is the corporation's. Indeed, the *Armour* court proceeds to say that the *Armour* defendants will be liable if they "personally voted or otherwise participated in" the tort. For this it cites *Phelps Dodge Refining Corp.* v. *F. T. C.*, (2 C. A. 1943) 139 F. 2d 393. The *Armour* court then proceeds to give an example of a wholly different kind of liability. It says (p. 439):

> "And an officer who disburses funds from a corporation's general banking account in favor of third persons with knowledge that the corporation has deposited in the account funds of the plaintiff which it holds as agent or bailee is liable for plaintiff's loss."

For this the *Armour* court cites *Santa Barbara* v. *Pasquale Avallone & Stefano Miele*, (1936) 270 N. Y. 1. But as Judge Finch pointed out in *Avallone* (p. 6):

> "Even when the fund was depleted, the wrong done by the Avallone corporation would not constitute

> a common-law conversion but instead a breach of trust. If the defendant Miele had signed checks depleting this fund with knowledge that a trust might be impressed upon the fund, he might be said to have acted as agent of the Avallone corporation in committing such a breach, and he, as well as the Avallone corporation, could be held liable as a trustee *de son tort*."

The meaning of the *Armour* court now becomes clear. If the *Armour* defendants voted for, or otherwise participated in a conversion of the *Armour* fertilizer or in a diversion of its proceeds, they were liable. And if they depleted the corporation's general banking account by signing checks in favor of third persons with knowledge that the corporation had deposited funds of the plaintiff in the account they were also liable, not for a conversion, but for a breach of trust.

Plainly, there is no conflict with the decision in the present case. And even if there were, it would be beside the point, for the question is whether "... a court of appeals ... has decided an important state ... question in a way in conflict with applicable state ... law" (Rule 19 (1)(b)). That *Aeroglide* correctly states the law of New York is amply demonstrated by the cases cited in Point II above and by the inability of petitioners to cite a New York case which supports their contention. This being so, there is no ground for granting certiorari.

POINT IV.

The question posed does not fairly arise upon the record.

The question which petitioners ask this Court to consider is as follows:

> "May a corporate director be personally liable in tort for conversion by voting for certain corporate action when in so voting he relies upon the advice of the corporation's attorney, and its general manager and without knowledge that the action which he thereby authorized may harm the rights of another?"

Petitioners did not take the stand and there was no evidence that in their participation in the conversion they had relied upon the advice of the corporation's attorney, its general manager, or anyone else.

That petitioners were "without knowledge" is a broad assumption.

The parties entered into the following stipulation [R. A. 40-41]:

> "It is hereby stipulated and agreed that if the defendants were called each of them would testify that in December, 1956, and on February 6, 26 and 27, 1957 [dates of acts of conversion], he was unaware of the provision in Exhibits 2 through 12, reading as follows: 'Legal title to the equipment will remain in the seller until full payment as herein stipulated has been received by the seller. Buyer agrees to do anything necessary to see that title so remains in the seller.' "

If petitioners were not alert to the fact that the machinery they were mortgaging was under conditional

sales contract it must have been because they had forgotten that fact, and not that they had never known it.

In the case of the principal $61,000 contract*, the proposals, which were on respondent's standard contract forms containing the retention of title provisions, were mailed to the Cooperative [R. a30, R. b3a]. The directors discussed them before the May 23, 1956 meeting [R. b1a]. At this meeting a committee, consisting of petitioners Zeh, Krupski, Gillispie and one Prusinowski (now deceased) [R. a17] were chosen to visit respondent's plant in Raleigh and were "* * * given the power to sign the grader contracts * * *" [R. b1a].

The committee journeyed to Raleigh, bringing the proposals with them [R. a17, 31; R. b1a, 3a]. After an entire morning's negotiation [R. b1a-4a], the committee obtained a reduction in price, and an agreement from respondent that additional equipment could be ordered under the same price schedule and upon the same contract terms [R. b3a, 4a]. Numerous changes in the proposals were embodied in a letter dated May 28, 1956, and a contract was prepared for signature, consisting of the proposals, the amending letter and a front sheet, also on respondent's standard form (including the retention of title provision), and set forth the total price, now reduced to $61,000. Kelly, respondent's vice president (now president), and petitioner Zeh, then signed the contract on the front sheet [R. a17, 31; R. b2a, 3a]. The committee took the contract back with them [R. b4a].

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* Since the District Court found that the machinery sold from the principal contract was converted [R. a26] and had a value greater than the amount of the unpaid indebtedness at the time of conversion [R. a20], the fact that the orders for the supplemental contracts were put through by Manager Brangenberg rather than by petitioners loses significance.

At the directors' meeting of May 31, 1956, the Board upon petitioner Gillispie's report voted a one-third payment in accordance with the terms of the contract [R. b2a-3a].

The contract in its final form [Ex. 3] contained the retention of title provision at least fourteen times. The principal contract and the confirmations of the supplemental contracts remained in the files of Cooperative, available to petitioners and were produced at the trial by Cooperative's assignee for the benefit of creditors.

The circumstances are such that petitioners must have known of the retention of title provision. Of course, petitioners Zeh, Krupski and Gillispie had a somewhat greater exposure to the terms of the contract through their extensive negotiations at Raleigh.

Since Zeh signed the contract the law would impute knowledge to him of its contents even if he did not have that knowledge. *Pimpinello* v. *Swift & Co.* (1930) 253 N. Y. 159; *Matter of Stone* (1936) 272 N. Y. 121; *Amend* v. *Hurley* (1944) 293 N. Y. 587, 595; *Upton, Assignee* v. *Tribilcock* (1875) 91 U. S. 45.

Manifestly, petitioners cannot plead misapprehension resulting from their own negligence as a defense to the liability which they incurred for participating in the conversion of respondent's machinery.

Conclusion.

The question which petitioners ask this Court to decide is not fairly raised by the record. But if it were, it is a question of New York law which this Court will not ordi-

narily examine and which, moreover, is amply supported by New York precedents.

The petition for certiorari should be denied.

Dated: New York, N. Y.,
July 18, 1962.

Respectfully submitted,

HAROLD HARPER,
Counsel for Respondent.